

BEFORE THE
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Leased Commercial Access

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CS Docket No. 96-60

COMMENTS OF THE TRAVEL CHANNEL

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In the Matter of)
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The Travel Channel, by its attorneys, hereby submits its
Comments in the above-captioned proceeding.¹

The Travel Channel is a 24-hour basic cable network providing award-winning programming devoted to travel news, documentaries on destinations around the world, travel advice, and travel entertainment shows. The Travel Channel was formed in 1987 and subsequently became a subsidiary of Landmark Communications, Inc. It is unaffiliated with any cable operator or multiple system operator ("MSO").

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In the Notice, the Commission proposes to lower commercial leased access ("CLA") rates in order to create higher demand for CLA. This proposal should be rejected because it would cause serious harm to the programming industry, as well as consumers and cable operators.

- **The Proposed Modifications to the CLA Rate Formula Will Cause Serious Harm to Non-CLA Programmers.**

The success of advertiser-supported basic cable services, such as The Travel Channel, is tied directly to the number of subscribers who have access to and watch their services. As a result, a primary concern such services have is gaining carriage on cable systems. It has been the Travel Channel's experience that the principal obstacle to carriage is a lack of available channel capacity. Many cable systems today are channel locked and those that are not generally have only a small number of channels available. Thus, creating artificial demand for CLA will reduce the channels available for non-CLA programmers and, in many cases, force cable operators to drop non-CLA services.

Moreover, established non-CLA programmers confronted with the possibility of being bumped may attempt to migrate to CLA status in order to stay on the system. This would simply constitute a transfer of wealth from the programmer to the cable operator (since the programmer in this situation would be paying for carriage rather than receiving payments from the operator) and ultimately would reduce investment in programming.

Creating high-quality programming services is already an expensive and risky proposition. The Commission should avoid any regulations which make the task more difficult.

- **The Proposed Modifications To The CLA Rate Formula Will Result In A Reduction Of Consumer Welfare.**

Forcing cable operators to bump established non-CLA programmers in order to make room for new CLA programmers, or providing increased incentives for CLA programmers to seek access to currently available or newly created channel capacity, is particularly inappropriate because CLA produces programming that consumers do not value. The low quality of CLA programming is based on the fact that CLA programmers must pay for carriage and cannot capture the economies of scale available through national distribution, since CLA agreements are typically system specific. Thus, if the Commission adopts a rule designed to create additional demand for CLA, it will reduce consumer welfare by creating a situation in which programming consumers value is replaced by programming they do not.

- **The Proposed Modifications To The CLA Rate Formula Will Harm Cable Operators In Violation of the Statutory "No Harm" Policy.**

Section 621(c)(1) of the Communications Act requires the Commission to assure that its CLA rules do not adversely affect the operation, financial condition, or market development of cable systems. If the Commission requires cable operators to drop a substantial amount of programming that consumers value and

replace it with programming they do not, it will have impermissibly harmed the operator. In addition, as the Commission recognized in its previous CLA Order, a low CLA rate could induce premium programmers that generate substantial revenues for the cable operator to migrate to CLA since doing so would effectively reduce their cost of carriage. Such migration could impose a significant financial hardship on cable operators in violation of the Act.

* * *

For the foregoing reasons, The Travel Channel urges the Commission not to adopt the changes to CLA proposed in the Notice. At most, if the Commission makes any changes to the CLA rules, it should proceed cautiously, making only incremental changes and providing strong transition relief. This would allow the Commission to analyze the impact of such changes without risking disruption of the programming and cable businesses and an overall reduction in consumer welfare.

**II. THE PROPOSED CHANGE IN THE CLA RATE FORMULA Will
SUBSTANTIALLY HARM CONSUMERS, PROGRAMMERS, AND CABLE
OPERATORS**

The proposed change in the CLA rate formula carries the potential to undermine the fundamental economics of the cable and video programming businesses to the detriment of consumers, programmers, and cable operators. More specifically, the proposed formula would: (1) lead to substantial dislocation of

high-quality and highly valued non-CLA programming by low-quality CLA programming that consumers do not value; and (2) cause migration of various non-CLA programmers to CLA capacity resulting in significant revenue losses to both cable operators and programmers.

A. Lowering CLA Rates Will Lead To The Bumping Of Existing Programmers And Will Make It More Difficult For Highly Valued Non-CLA Programmers To Obtain Carriage

The Travel Channel and other non-CLA programmers face severe difficulties in obtaining carriage on cable systems, chiefly because the majority of cable systems have little or no available channel capacity on their systems. Most cable systems today still have capacity of 53 channels or less.² By contrast, there are more than 128 cable programming networks.³ Consequently, most cable systems are capable of offering subscribers only a small percentage of the programming options available. This small percentage is reduced further still when one considers the significant and ever-increasing number of channels cable systems must designate for must carry, CLA, PEG access, and other

² See Cable Television Developments, Spring 1996, National Cable Television Associations publication, at 10-11.

³ See In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, FCC 95-491 (released December 11, 1995), at ¶19 ("1995 Video Competition Report"). In addition, 80 new networks are expected to launch no later than 1996. Id. at ¶ 19 and Appendix H, Tables 3 and 4.

unaffiliated programming to comply with the channel occupancy limit.

It is not surprising, therefore, that most cable systems are channel locked. As of April 1995, cable systems serving 67% of cable households had no unused activated channels.⁴ In The Travel Channel's experience, the lack of available channel capacity is by far the principal obstacle to gaining carriage on cable systems.

Given these significant channel constraints, the effects of the proposed CLA formula will be particularly damaging. This formula -- which will produce substantially lower CLA rates than the current highest implicit fee formula -- will artificially create new demand for CLA which, in turn, will: (1) further limit the ability of The Travel Channel and other non-CLA programmers to increase their carriage opportunities on currently available or newly created cable channel capacity; and (2) in many cases (on channel-locked systems) cause existing high quality and highly valued non-CLA programmers, such as The Travel Channel, to be bumped by low-quality CLA programming which consumers do not value.

⁴ See Arthur D. Little Report, Availability of Channels in U.S. Cable TV Systems, at 9 (April, 1995). These systems serve approximately 41.5 million cable subscribers. Id.

The low quality nature of CLA programming is rooted in the fact that the CLA regime is at odds with the fundamental economics of the cable programming business.⁵ It is very expensive to produce high quality programming. The Travel Channel, for example, has invested over \$21 million in the past four years to develop its service. Cable programmers finance production primarily from fees paid by cable operators for carriage (particularly in the critical early stages of a program service's development when advertising revenue is minimal). Moreover, the high cost of programming production requires that programmers (including niche or targeted programmers) seek economies of scale through national distribution. As described by several noted economists:

By supplying identical programs to many [systems], networks both increase the financial base available to fund program production, enabling more expensive programs to be produced, and reduce the per-viewer costs of producing and distributing any given program. ... These elementary and unalterable principles explain why nationally distributed television programming will usually have greater viewer appeal than programs produced and aired only locally.⁶

⁵ In fact, the Senate Report to the 1992 Cable Act acknowledges that "[t]he cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use." Notice at ¶ 26; S. Rep. No. 92, 102nd Cong., 1st Sess. 31-32 (1992) ("1992 Senate Report").

⁶ See, Besen, Krattenmaker, Metzger, Jr. & Woodbury, Misregulating Television: Network Dominance and the FCC, at 5 (Chicago: 1984).

In other words, national carriage and the corresponding fees paid for such carriage are essential to the growth and success of cable programmers.

By contrast, CLA programmers do not receive payments from cable operators in return for carriage on the system. Rather, CLA programmers must pay the operator for carriage. Moreover, substantial transaction costs are incurred in negotiating access on a system-by-system basis. Accordingly, most CLA programmers have little financial resources left for high-quality production. For these reasons, CLA necessarily tends to produce lower-quality programming.

The proposed change to the CLA rate formula will not solve the fundamental problem with the economics of CLA. Rather, it will simply increase the amount of dislocation of high-quality non-CLA programming in favor of lower-quality CLA programming. This dynamic, of course, harms consumers, as well as programmers. Consumer welfare is diminished because the value of the cable service consumers receive is reduced. This is all the more troubling because there is no corresponding reduction in the price consumers will pay for the service.

Similarly, reducing the value consumers attach to cable service obviously harms cable operators. This is true even if operators are forced to drop (or are prevented from adding) established niche services to accommodate CLA programmers. Such services have small, but loyal audiences and are critical to an operator's ability to increase penetration by appealing to a wide range of consumer tastes. Moreover, a reduction in the quality of cable service (as a result of substituting CLA programming for established high-quality services) may lead subscribers to drop their subscriptions, particularly given the increasing competition in the MVPD marketplace. Such subscriber loss will cause additional financial harm to cable operators contrary to the "no harm" mandate in Section 612(c)(1).

B. The Proposed Change In The CLA Rate Formula Will Encourage Non-CLA Programmers To Migrate To CLA; Such Migration Will Further Inhibit Non-CLA Programmer Viability and Unlawfully Harm Cable Systems

The proposed changes in the CLA formula provide strong incentives for certain non-CLA programmers to migrate to CLA. For example, programmers that are confronted with the possibility of being dropped from cable systems due to increased demand for CLA capacity may attempt to migrate to CLA status in order to stay on the system (they might do so, for example, in order to retain advertising revenue, assuming the revenue exceeds the CLA rate). Such migration ultimately would reduce programming quality. As stated above, a programmer is able to produce high-

quality programming with revenues generated from cable operator payments. If, instead, the programmer has to pay the operator for carriage, its ability to finance programming will be reduced.

In effect, such migration results in the transfer of wealth from start-up programmers to cable operators, with no corresponding benefit to consumers (since the programming on the cable system would not change under this migration scenario). For programmers forced to migrate in this fashion, the cable operator payments which are essential to high quality production and, correspondingly, national consumer appeal, would be eliminated. As a result, programming quality and diversity will suffer and consumer welfare would be reduced.

The proposal to deviate from the highest implicit fee and to abolish CLA programming categories could prompt a second type of migration. For example, premium programmers, which provide significant revenues to the cable operator, could find it more profitable to pay a CLA rate to the cable operator and to capture entirely for themselves the subscriber charge (previously split between the operator and the programmer).⁷ The loss of such

⁷ See Stanley M. Besen, et. al., An Analysis of Cable Television Rate Regulation, attached to the comments of TCI on the NPRM in MM Docket 92-266, FCC 92-544, at 55 (Jan. 29, 1993) ("[I]t seems likely that the migrants would be precisely those programmers whose presence on the operator's lineup make it possible for the operator to cover its costs of system construction.").

revenues by the cable operator would have severe financial effects.⁸

Should the Commission conclude that adoption of the proposed CLA rules does not harm cable operators and therefore violate the statute, it must explain its reasons for disregarding its earlier concerns about migration. The Commission previously rejected a cost-of-service option for purposes of calculating maximum leased access rates, in part because of concerns that it would cause migration.⁹ Yet the cost-based rate formula posed by the Commission in the Notice is a cost-of-service formula and would - as shown above -- induce migration. In proposing the new formula, the Commission does not explain why a cost-of-service formula is now acceptable or, more importantly, why migration is no longer problematic. It is uncontroverted that the Commission may not "blithely cast [] aside" its prior conclusions without advancing a reasoned explanation.¹⁰ Unless such explanation is forthcoming, the Commission's proposed formula cannot stand.¹¹

⁸ Id. at 56 ("if access rates are set too low, the negative effects can be large") (citations omitted).

⁹ See Rate Order, 8 F.C.C.R. 5631, ¶ 573 (1993).

¹⁰ See, e.g., Achernar Broadcasting Co. v. FCC, 62 F.3d 1441, 1449 (D.C. Cir. 1995); Telephone & Data Sys. v. FCC, 19 F.3d 42, 49 (D.C. Cir. 1994).

¹¹ As noted, even if the formula did not suffer from such procedural defects, it is still unlawful as it violates Section 612(c)(1).

III. THE FCC SHOULD MAINTAIN THE CURRENT CLA REGULATORY SCHEME; HOWEVER, SHOULD THE COMMISSION FEEL COMPELLED TO ALTER THE SCHEME, IT SHOULD MAKE ONLY MARGINAL CHANGES THAT WILL NOT HARM PROGRAMMERS, OPERATORS, AND CONSUMERS

There is no need for the Commission to adopt the proposed changes to the CLA rate formula. As discussed previously, such changes are unlawful and would harm programmers, operators, and consumers. Moreover, the changes are unnecessary because the goals behind CLA have already been achieved. Should the Commission nonetheless feel that modifications are necessary, it should make only marginal changes and provide strong transition relief to ensure that any changes in the CLA rules do not harm programmers, operators, or consumers.

A. The Current CLA Rate Scheme Should Not Be Altered

As shown above, the proposed changes to the CLA rate formula will cause severe harm to consumers, programmers and cable operators. There is simply no reason for the Commission to risk reducing consumer welfare and disrupting the programming and cable industries. Congress's goal in adopting CLA back in 1984 was to foster diversity in the cable programming arena. This diversity goal has been met, and unaffiliated commercial program services already obtain carriage on cable systems without the need for CLA channels. As noted, more than 128 different national and niche programmers now compete for access to cable subscribers and nearly half of those are not affiliated with any cable operator. Diversity will increase even further because

sixty-two of the eighty cable program services that have announced plans to launch (78%) are unaffiliated with any cable operator.¹² Indeed, in adopting the changes to the leased access provisions in the 1992 Cable Act, Congress recognized that the lack of CLA use could well be due to the fact that the industry already had accommodated a diverse array of programming sources.¹³

In short, the suggestion in the Notice that underutilization of CLA capacity demonstrates that CLA rates are too high is unfounded. The reality is that CLA demand is low because, as described above, the economics of CLA are inconsistent with the realities of the programming business, and because diversity is being provided by numerous affiliated and unaffiliated non-CLA programmers. Thus, the Commission's effort to create demand is misguided.

¹² See 1995 Video Competition Report at ¶ 19 and Appendix H, Tables 3 and 4. Moreover, even aside from the existing and new unaffiliated cable networks, the Commission itself has stated that "broadcast, PEG and leased access channels already provide[] substantial unaffiliated programming." See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order on Reconsideration of the Second Report and Order, 10 F.C.C.R. 7364, at ¶ 15 (1995).

¹³ See 1992 Senate Report at 30. Congress acknowledged the cable industry's rationale that the CLA provisions have not been used because "the industry has been successful in meeting the diverse range of viewing needs." Id. (citing Answers to Questions submitted to John Malone, "Oversight of Cable TV," p. 146).

It is thus no accident that the Commission's proposed overhaul of the CLA regime -- with all of the attendant ills described above -- is predicated on little more than anecdotal reports, unsubstantiated claims of a few parties, and pure conjecture. Specifically, the Notice cites only six parties who allege that the leased access rates produced by the current highest implicit fee formula are too high.¹⁴ Moreover, a review of the Commission's records reveals that in the three years since the CLA rules were adopted, only 71 complaints have been filed. In other words, at most, only 0.6% of the 11,220 cable systems in the country have been the subject of a CLA complaint.¹⁵ Further, this miniscule number overstates the level of concern about the current CLA rate formula for two reasons. First, of the 71 CLA complaints filed, 20 (i.e., 28%) have been filed by the same two parties -- Lorelei Communications, Inc. and Karl Schroll,¹⁶ and

¹⁴ The six parties are Center for Media Education, et al. ("CME"); VideoMaker Magazine, Paradise Television Network, Sur Corporation, Community Broadcasters Association ("CBA"), and ValueVision. See Notice at ¶¶ 19-21.

¹⁵ The 71 complaint number was derived using a LEXIS search (i.e., "CSR w/5 -L") in the FEDCOM/FCC library which retrieved the FCC's public notice listings of each CLA complaint (all CLA complaints are coded by the Commission using the CSR-xxxx-L format and the public notice of such complaints is published by LEXIS). The 11,220 cable system reference is from Television and Cable Fact Book, at F-2 (Warren Publishing, Inc. 1996).

¹⁶ All of the five complaints filed by Mr. Schroll were later dismissed after Mr. Schroll failed to respond to Commission requests for further information establishing a violation of the leased access rules. See, e.g., Karl Schroll v. Comcast Cable

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five other complaints have been dismissed. Second, of the remaining 46 complaints, at least seven address issues unrelated to the actual method of calculating maximum CLA rates under the highest implicit fee formula, including scheduling and insurance,¹⁷ the speed with which an operator must respond to requests for CLA,¹⁸ an operators' obligation to provide billing services;¹⁹ and an operators' obligation to provide CLA rates for only part of the franchise area.²⁰

The Commission cannot and should not proceed with the proposed radical transformation of the CLA regulatory regime

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Communications of Philadelphia, Inc., CSR-4372-L, DA 96-286 (released March 12, 1996) (dismissing the complaint after the cable operator had shown that the complainant had been satisfied and the complainant failed to provide a statement of why the prosecution should continue).

¹⁷ See Tony Chauncey v. Continental Cablevision of Southern California, DA 95-1353 (released June 15, 1996) (denying in part and granting in part a complaint challenging aspects of the cable operator's CLA contract which were unrelated to rates).

¹⁸ See Advantage Video & Marketing, Inc. v. Comcast Cablevision of Lower Merion, Inc., 10 F.C.C.R. 7681 (1995) (addressing whether a substantial delay in responding to a leased access request amounted to a denial of leased access).

¹⁹ See Complaint of Dan Meazell, (Houston, TX), CSR-4619-L (challenging the cable operator's refusal to provide pay-per-program billing services).

²⁰ See Complaint of Kathleen B. and Sidney T. Roberts (Bellaire, TX), CSR-4276-L (asking that a cable operator be required to allow a programmer to purchase leased access time for only part of a franchise area).

given such anecdotal evidence and the lack of an adequate foundation on the one hand, and the demonstrable harms that such a transformation would impose on cable programmers, cable operators, and consumers on the other.²¹

B. To the Extent the Commission Changes the CLA Rules, It Should Implement Changes Incrementally Over Time and Prohibit Bumping Except Upon Expiration of Non-CLA Programmers' Contracts.

The Commission cannot accurately predict the outcome of changes in the CLA rate formula. As noted, there is great potential for harm if the Commission creates unjustifiably low CLA rates. Therefore, if the Commission believes that the CLA regulatory scheme must be altered, at most, the Commission should: (1) implement changes incrementally over time; and (2) prohibit bumping except upon expiration of the incumbent non-CLA programmers' contracts.

Phasing in any changes over time will allow the Commission to evaluate the success of the changes and to detect and remove potentially harmful rules before they significantly damage the

²¹ Nor can the Commission cite the fact that Congress did not alter the leased access provisions in the 1996 Act to support such a radical transformation. The fact that the 1996 Act does not change Section 612 of the Communications Act supports the proposition that Congress believed the current CLA rules are working and do not need altering. This proposition is especially true in light of the fact that in the past, where Congress believed changes to the CLA rules were required, it amended Section 612 (i.e., in the 1992 Cable Act) directing the Commission to implement such changes.

industry.²² Moreover, a phase-in would also decrease the odds of bumping and consumer disruption because it would allow time for channel capacity to increase via the implementation of digital compression technology. Indeed, the Commission recognized the wisdom of such an approach in the channel occupancy context:

We continue to believe that expanded channel capacity will reduce the need for channel occupancy limits. As we previously indicated in the Further Notice, the expanded channel capacity that will result from fiber optic cable and digital compression technology will help obviate the need for such limits as a means of encouraging cable operators to carry unaffiliated or competing video programming services. . . . [V]astly larger cable systems will likely be inclined to deliver targeted "niche" video programming services aimed at correspondingly smaller audience sizes.²³

A circumspect incremental approach is particularly warranted in light of changes the Commission has already made to the current highest implicit fee formula in the leased access reconsideration order. The reconsideration order makes four principal changes to this formula,²⁴ the combined effect of which

²² The Commission has continuing authority to assess whether these changes are adequate and, if necessary, make further modifications. See Communications Act of 1934, as amended, § 612(g), 47 U.S.C. § 532(g).

²³ See Ownership Limits Order, 8 F.C.C.R. 8565, at ¶ 83 (1993).

²⁴ These changes are as follows: (1) the implicit fee for each must-carry and PEG channel should not be considered when calculating the highest implicit fee; (2) the highest implicit fee should be calculated on a tier-by-tier basis; (3) revenues received from an unaffiliated programmer, such as a home shopping channel, should not be included in the highest implicit fee calculation; and (4) for BST or CPST, the leased access fee should be based on the number of current subscribers on the tier

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will be to reduce the highest implicit fee in all cable systems. The Commission should not rush to implement a new CLA formula when the impact of its latest changes have not yet been observed.

In this regard, while The Travel Channel supports the concept of the transition period to the new CLA rate formula described in Exhibit E of the Notice, the Commission's specific proposal does not go far enough to avoid the deleterious effects of its revised CLA formula. Programmers like The Travel Channel make substantial investments in programming over a period of years. They make these investments based on their reliance on the Commission's current regulations. If changes to these rules are implemented without an adequate transition period, the impact on the programming industry could be devastating. Therefore, although The Travel Channel reiterates its view that no changes should be made to the existing CLA rules, if changes are made, The Travel Channel proposes that: (1) in year one, the highest implicit fee continue to be used to calculate the maximum CLA rates; and (2) the phase-in of any new CLA rate formula be heavily back-end loaded so that there are relatively modest CLA rate reductions in the early years and larger CLA rate reductions

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where the leased access programmer will be placed; for per-channel/per-event programs, the average number of subscribers to premium services should be used. See Notice at ¶¶ 33-39.

in the later years. This back-end loaded approach would allow programmers and operators sufficient time to adjust to the new formula and to alter their business plans accordingly, thereby minimizing marketplace disruption.

In addition, contrary to the proposal in the Notice,²⁵ the phase-in of the new CLA rate should not be limited to systems that are channel locked. As noted, programmers' concerns about the proposed CLA rules are not confined to being bumped from channel-locked systems. Rather, the long-term viability of The Travel Channel and other cable programmers is equally tied to the ability of such programmers to increase their carriage opportunities. To the extent a dramatic reduction in CLA rates results in CLA services occupying currently unused or newly created channels on cable systems, this too would be harmful to the cable programming industry. Consequently, a phase-in of the new CLA rate must apply to all systems, not simply those that are channel locked.²⁶

In conjunction with the phase-in of the new CLA rules, the Commission should adopt a rule that allows incumbent non-CLA programmers to be bumped from cable systems in order to

²⁵ See Notice at ¶ 99.

²⁶ For the same reasons that a phase-in of the CLA rate formula is required to minimize disruption, dislocation, and consumer confusion, a phased in approach should be extended to all non-rate aspects of any CLA rule changes that the Commission adopts.

accommodate a CLA programmer only upon the expiration of the non-CLA carriage contract. As the Commission has noted,

[T]here may be circumstances when substantially greater harm to the subscribers, the operator, and the non-leased access programmer may result if the leased access request is accommodated than would result for the leased access programmer if the leased access request is not accommodated.²⁷

Bumping incumbent non-CLA channels is the type of situation of which the Commission spoke. Bumping would be disruptive, serve no useful purpose, and would result in consumer confusion and welfare losses as valued channels are removed from the system and replaced by lower quality programming which consumers do not value. Additionally, bumping would cause substantial economic problems in light of the fact that many programmers, including The Travel Channel, have entered into multiple business contracts in reliance on the sanctity of their agreements.²⁸ Thus, bumping certainly would invite litigation over the scope of incumbents' rights. For example, incumbents could press takings claims based on their reliance interests.²⁹

²⁷ Notice at ¶ 124.

²⁸ See Notice at ¶ 99 ("A transition to the new formula might (a) avoid unduly penalizing operators and programmers for decisions to use designated channels for non-leased access programming that were reasonably based on circumstances created by the Commission's previous rules, and (b) mitigate against the sudden disruption to subscribers' programming line-ups.").

²⁹ See Ruckelshaus v. Monsanto, Co., 467 U.S. 986, 1005 (1984). For the same reasons, part-time CLA programmers should not be able to displace full-time non-CLA programmers. Instead, CLA

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By contrast, the combination of a phased in approach and a "no bumping until contract expiration" policy would avoid many of these problems, especially since the advent of channel expansion technologies such as digital compression will create enough capacity so that non-CLA programmers will not have to be bumped. In fact, the Commission has previously adopted such an incremental, non-disruptive approach in similar circumstances. Specifically, in the channel occupancy context where changes would have confused consumers and disrupted existing carriage agreements, the Commission declined to force vertically integrated programmers off the system to make room for non-affiliates:

We believe that this [grandfather] proposal will minimize the disruption to existing programming relationships and will prevent subscriber confusion, which could result from divestiture or program deletion. ... Moreover, given the trend toward increased channel capacity as a result of improved cable technologies, it appears that no useful purpose would be served by requiring cable operators to drop existing services.³⁰

(... continued)

programmers who seek only part-time capacity should be required to utilize part-time capacity available on other CLA channels or wait until such capacity is available on the requested channels.

³⁰ See Ownership Limits Order, 8 F.C.C.R. 8565 at ¶ 94.

IV. MISCELLANEOUS ISSUES

A. The Commission is Legally Prohibited From Mandating That CLA Programming Be Provided as Part of Any Particular Tier or Channel

The Notice's proposal to require that CLA programming be placed on certain highly penetrated tiers is expressly prohibited by the Communications Act.³¹ Section 624(f)(1) of the Act states:

Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.³²

As the Notice correctly recognizes, "Congress did not mandate specific tier or channel location for leased access, as it did for PEG channels."³³ Given the absence of such an express congressional mandate, Section 624(f)(1) prohibits the Commission from mandating CLA tier or channel placement.

Moreover, there is no policy basis for the Commission to favor CLA programmers with preferential tier treatment. Rather, CLA programmers are commercial ventures and should have to negotiate for tier placement just like the Travel Channel and other programmers.

³¹ Notice at ¶¶ 118-119.

³² Communications Act, § 624(f)(1), 47 U.S.C. § 544(f)(1) (emphasis added).

³³ Notice at ¶ 116.

**B. The Commission is Legally Prohibited from Mandating a
"First Come, First Served" Access Scheme**

The proposed "first come, first served" access scheme³⁴ impermissibly precludes cable operators from examining the nature of the service to be offered and unlawfully transforms cable operators into common carriers. The Act and its legislative history make plain that CLA did not bar cable operators from setting prices based on the nature of the service to be offered.³⁵ The reason for such leeway was to ensure that cable operators would be able to provide a mix of programming designed to increase subscriber penetration and satisfy the broad interests of consumers.³⁶ Without the ability to examine the nature of the proposed service, overlapping non-diverse CLA programming would result, (e.g., The Travel Channel is dropped to make room for a fourth, fifth, or sixth home shopping channel), thereby undermining the diversity goal of the CLA provisions.

Furthermore, the "first come, first served" access scheme improperly imposes common carrier regulation on cable operators

³⁴ Id. at ¶ 128.

³⁵ See Communications Act, § 612(c)(2), 47 U.S.C. § 532(c)(2). See also 934 H.R. Rep., 98th Cong., 2d Sess. 51 (1984) ("1984 House Report") ("It is therefore appropriate for the cable operator in establishing reasonable price, terms and conditions . . . to do so on the basis of the nature of the service being provided.").

³⁶ See 1984 House Report at 51.